INDEX.

Page

QUESTIONS PRESENTED 1

STATEMENT 2

SUMMARY OF ARGUMENT 2

ARGUMENT:

I. To the Extent that the Applicable Statute requires to be included in the Value of the Decedent's Gross Estate, the Value at the Time of Death of Property held by the Decedent and Spouse as Tenants by the Entirety under the Law of Pennsylvania, it imposes a Direct Tax on such Property, which, being unapportioned, is in Violation of the Limitations prescribed by the Third Clause of Section 2 and the Fourth Clause of Section 9 of Article I of the Constitution 3

A. The tax imposed by the applicable statute is indirect only to the extent that it reaches property, or interests therein, passing as a result of the exercise by the decedent of the privilege of transmitting property at death . 4

B. Under the law of Pennsylvania, which is controlling, no interest in property held by a decedent and spouse as tenants by the entirety passes at the death of one tenant, to the survivor, by virtue of the exercise by the decedent tenant of the privilege of transmitting property at death; and, therefore, in such case the subject or event upon which the tax must be predicated is wanting 17

INDEX (Continued).

Page

II. Insofar as the Applicable Statute Requires the Inclusion in the Value of the Gross Estate of the Value of Property not Transferred by the Decedent in the Exercise of the Privilege of Transmitting Property at Death, it Contravenes the Fifth Amendment of the Constitution 36

III. Consideration of Petitioners' Argument 38

CONCLUSION 60

APPENDIX A 61

APPENDIX B 62

CITATIONS.

CASES:

Page

A. Hupfel's Sons v. Getty, 292 Fed. 178, 299 Fed. 939 24
Allen v. Henggeler, Adm'r, 32 Fed. (2d) 69, certiorari denied, 280 U. S. 72 A. 34, 50
Beddingfield v. Estill and Newman, 118 Tenn. 39, 100 S. W. 108, 9 L. R. A. (N. S.) 640 27
Beihl v. Martin, 236 Pa. 519 ..... 17, 23, 24, 25
Bingler v. Bowman, 194 Pa. 210 51
Blount v. United States, 59 Court of Claims 328 .. 60
Bromley v. McCaughn, 280 U. S. 124 ..... 4, 11, 57
Brushaber v. Union Pacific R. R. Co., 240 U. S. 1 . 3, 61
Carnill, Ex'r. v. McCaughn, 30 Fed. (2d) 696 48
Chase National Bank v. United States, 278 U. S. 327 . 10, 12, 16, 36, 39, 40, 42, 44, 45, 46, 47, 51, 56, 57
Clarke v. Clarke, 178 U. S. 186 33
Cohens v. Virginia, 6 Wheat. 264, 5 L. ed. 257 57
Crooks v. Harrelson, 35 Fed. (2d) 416 34
Dawson v. Kentucky Distilleries and Warehouse Co., 255 U. S. 288 11
DeVaughn v. Hutchinson, 165 U. S. 566 33
Dime Trust and Safe Deposit Co. v. Phillips, 30 Fed. (2d) 395 60
Diver v. Diver, 56 Pa. 106 19
Dyer, Appeal of, 5 B. T. A. 711 60
Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458 33
Edwards v. Slocum, 264 U. S. 61 11
Fidelity-Philadelphia Trust Co. v. McCaughn, 34 Fed. (2nd) 600, certiorari denied, 280 U. S. 80 A. 46
Fink, Henry G., Estate of, 6 Erie County Law Journal 281 26

CASES (continued):

	Page
Flint v. Stone-Tracy Co., 220 U. S. 107	58
Frew v. Bowers, 12 Fed. (2d) 625, certiorari allowed, 273 U. S. 682	38, 47, 48, 58
Frick v. Pennsylvania, 268 U. S. 473	37, 58
Gasner v. Pierce, 286 Pa. 529	20, 22
Greiner v. Lewellyn, 258 U. S. 384	10
Hunt v. Blackburn, 128 U. S. 464	32
Hylton v. United States, 3 Dall. 171	4
Knowlton v. Moore, 178 U. S. 41	3, 6, 8, 39
Leach's Estate, 282 Pa. 545	27
Lewellyn v. Frick, 268 U. S. 238	58
Linder v. United States, 268 U. S. 5	32
Lyon's Estate, 233 N. Y. 208, 135 N. E. 247	29
Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. ed. 97	32
May v. Heiner, October Term, 1929, No. 311 (Not yet reported)	16, 48
McCaughn v. Girard Trust Co., 11 Fed. (2d) 520	47, 48
McCurdy v. Canning, 64 Pa. 39	21, 22, 23
McKelway's Estate, In re, 221 N. Y. 15, 116 N. E. 348	31
McLain, Ex'r., v. Hinden, 10 Pa. District and County Reports, 663	22
Meyer's Estate (No. 1), 232 Pa. 89	19, 22, 24
Meyer's Estate (No. 2), 232 Pa. 95	21, 25
Milano et ux. v. Fayette Title and Trust Co., 96 Pa. Super. Ct. 310	22
Murphy, Appeal of, 5 B. T. A. 952	60
New York Trust Co. v. Eisner, 256 U. S. 345	3, 10
Nichols v. Coolidge, 274 U. S. 531	10, 11, 36, 37, 47, 58, 59
O'Malley v. O'Malley, 272 Pa. 528	21
Palmer v. Treasurer and Receiver General, 222 Mass. 263, 110 N. E. 283	27

Cases (continued):

Page

Pennsylvania Trust Co. v. Mischik, 96 Pa. Super. Ct. 255 23
Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 158 U. S. 601 4
Randall v. Krieger, 90 U. S. 137 49
Reinecke v. Northern Trust Co., 278 U. S. 339 .... 10, 14, 15, 16, 36, 39, 42, 44, 45, 46, 47, 48, 52, 57
Richards v. McClelland, 29 Pa. 385 51
Root, Appeal of, 5 B. T. A. 696 ..... 9, 36, 58, 60
Saltonstall v. Saltonstall, 276 U. S. 260 ..... 16, 46
Schlesinger v. Wisconsin, 270 U. S. 230 59
Scholey v. Rew, 90 U. S. 331 3
Stebbins v. Riley, 268 U. S. 137 7
Stuckey v. Keefe's Ex'rs., 26 Pa. 397 22
Talcott v. United States, 23 Fed. (2d) 897 34
United States v. Robbins, 269 U. S. 315 34
United States v. Robertson, 183 Fed. 711, certiorari denied, 220 U. S. 616 32
United States v. Title Insurance and Trust Co., 265 U. S. 472 34
United States v. Waite, 33 Fed. (2d) 567, certiorari denied, 280 U. S. 98 A. 49
Weiss v. Beihl, 232 Pa. 97 25
Y. M. C. A. v. Davis, 264 U. S. 47 ..... 3, 8, 9

United States Statutes:

Revenue Act of 1916, c. 463, 39 Stat. 756, 777-8 48
Revenue Act of 1918, c. 18, Sec. 402(c), 40 Stat. 1057, 1096 16
Revenue Act of 1919, c. 18, Sec. 402(c), 40 Stat. 1057, 1096 ..... 11, 36
Revenue Act of 1921, c. 136, 42 Stat. 227, 277-8 .... 2, 4, 53, 56

Cases (continued): Page

Sec. 401 ..... 4, 9, 35, 54, 57, 58
Sec. 402(d) 5, 11, 55, 56, 59
Sec. 403 5
War Revenue Act of 1898, Sec. 29 32

Pennsylvania Statutes:

Act of April 11, 1848, P. L. 536 19
Act of June 8, 1893, P. L. 344 (West's Pa. Stat., 1920 ed., Sec. 14569) 19, 51
Act of May 24, 1923, P. L. 446 (West's Pa. Stat., 1928 Supp., Secs. 10172a-1 to 5) 20
Act of May 13, 1925, P. L. 649 (West's Pa. Stat., 1928 Supp., Sec. 10172c 20
Act of May 10, 1927, P. L. 884 (West's Pa. Stat., 1928 Supp., Secs. 10172b-1 to 4) 21
Act of May 16, 1929, P. L. 1795, 1797 26

Massachusetts Statutes:

St. 1909, c. 490, Part IV, Sec. 1 28
St. 1912, c. 678, Sec. 1 28

New York Statutes:

Cons. Laws, c. 60, Sec. 220, subd. 7 29

Textbooks:

Cooley, Constitutional Limitations, 8th ed., Vol. I, p. 11 32
Handy, Inheritance and Other Like Taxes, 1929 ed., Chap. XI, p. 127 60

IN THE

Supreme Court of the United States

October Term, 1929.

No. 546.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

PROVIDENT TRUST COMPANY OF PHILADELPHIA AND CHARLES SINKLER,
Administrators, etc.

No. 547.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON,
Executors, etc.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

QUESTIONS PRESENTED.

The respondents concur in the statement of the questions involved as contained in the brief of the petitioners, pages 2 and 3.

STATEMENT.

The respondents accept the statement of facts as contained in the brief of the petitioners, pages 4 to 8.

SUMMARY OF ARGUMENT.

The Federal estate tax can be imposed only upon the exercise of the privilege of transmitting property at death. Under the law of Pennsylvania, which is controlling, the interest of a decedent tenant by the entirety in property held by himself and his spouse as tenants by the entirety does not, upon his death, pass to the surviving tenant by virtue of the exercise of the privilege of transmitting property at death. There was no shifting of economic benefits, because the decedent tenant had no power of control whereby he could before or after death deprive the tenant who survived of the possession and enjoyment of the property acquired by virtue of the creative instrument. Nor did the use and enjoyment of the property first pass or shift to the survivor upon the death of the decedent tenant. Since the decedent tenant's interest in such property is not transmitted at death, there is no event upon which the imposition of an estate tax can be constitutionally predicated. The Revenue Act of 1921, by requiring the inclusion in the gross estate of the value of property held by a decedent and his spouse as tenants by the entirety, imposes a direct tax on such property; and since the tax is unapportioned, it is unconstitutional. If, however, the intent of the Congress was merely to include the value of property held by the decedent and his spouse as tenants by the entirety in the measure of the tax to be imposed on the transmission of other property, then the tax, so measured, is arbitrary, whimsical and capricious and violates the due process clause of the Fifth Amendment. The mere desire to equalize taxation, or to prevent tax avoidance or evasion will not justify a burden on something not within the power of the Congress to tax.

ARGUMENT.

I.

TO THE EXTENT THAT THE APPLICABLE STATUTE REQUIRES TO BE INCLUDED IN THE VALUE OF THE DECEDENT'S GROSS ESTATE, THE VALUE AT THE TIME OF DEATH OF PROPERTY HELD BY THE DECEDENT AND SPOUSE AS TENANTS BY THE ENTIRETY UNDER THE LAW OF PENNSYLVANIA, IT IMPOSES A DIRECT TAX ON SUCH PROPERTY, WHICH, BEING UNAPPORTIONED, IS IN VIOLATION OF THE LIMITATIONS PRESCRIBED BY THE THIRD CLAUSE OF SECTION 2 AND THE FOURTH CLAUSE OF SECTION 9 OF ARTICLE I OF THE CONSTITUTION.

By Section 8 of Article I of the Constitution, Congress is given the general power "to lay and collect taxes, duties, imposts and excises," except on exports, and subject only to the following restraints or limitations: (1) direct taxes must be imposed by the rule of apportionment (Constitution, Article I, Section 2, Clause 3, and Section 9, Clause 4); and (2) indirect taxes by the rule of uniformity (Constitution, Article I, Section 8, Clause 1). See the quotation from the opinion of Mr. Chief Justice White in Brushaber v. Union Pacific Railroad Co., 240 U. S. 1, at pages 12-14 (1915), printed as Appendix A to this Brief at page 61; Scholey v. Rew, 90 U. S. 331 (1875).

It has been decided that the various estate taxes imposed by the several Revenue Acts are not generally taxes imposed upon property because of its ownership, but taxes on its transmission at death. Knowlton v. Moore, 178 U. S. 41 (1900), New York Trust Company v. Eisner, 256 U. S. 345 (1921) and Y. M. C. A. v. Davis, 264 U. S. 47 (1924). There must be some transmission or transfer of property effected by the death of the decedent. In the absence of

such transmission or transfer, there is no privilege or exercise of any right toward which the taxing power may be directed and the tax can fall nowhere except directly on the property in question, and will therefore be a direct tax and unconstitutional, unless apportioned. See opinion of Kirkpatrick, J., in the Provident Trust Company case in the Eastern District Court of Pennsylvania, Record pp. 6, 7. "As the present tax is not apportioned, it is forbidden if direct": Mr. Justice Stone, speaking in reference to the gift tax in Bromley v. McCaughn, 280 U. S. 124 (1929); Hylton v. U. S., 3 Dall. 171 (1796); Pollock v. Farmers' Loan and Trust Company, 157 U. S. 429, 158 U. S. 601 (1895). The Revenue Act of 1921 contains no provision for apportionment, and therefore to the extent that its provisions result in imposing a tax upon property solely by reason of its ownership, and regardless of its use or disposition, it contravenes the Constitutional limitation concerning the apportionment of direct taxes.

The fundamental question in each of the instant cases is whether or not the Congress has exceeded its powers in requiring the inclusion in the value of the gross estate of the value of property held by the decedent and spouse as tenants by the entirety.

It becomes pertinent, first, to look at what the Congress has attempted to reach by the tax imposed pursuant to the provisions of the applicable statute.

A. The Tax Imposed by the Applicable Statute is Indirect only to the Extent that it Reaches Property, or Interests Therein, Passing as a Result of the Exercise by the Decedent of the Privilege of Transmitting Property at Death.

Section 401 of the Revenue Act of 1921, C. 136, 42 Stat. 227, imposes "upon the transfer of the net estate of every decedent dying after the passage of this Act" a tax equal to certain specified percentages of the value of such net estate.

In Section 403, it is provided that the value of the net estate shall be determined by subtracting from the value of the gross estate certain deductions specified therein. The method for determining the value of the gross estate is prescribed by Section 402, which provides, in part:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .
> * * * * * * * * * *
>
> "(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* that where such property or any part thereof, or, part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof; * * * "

Death duties have always been regarded as excise or indirect taxes because imposed upon the happening of an

excisable event, viz, the transfer or transmission of property at death. Their history and nature have been exhaustively reviewed by Mr. Justice White in the course of his opinion in KNOWLTON v. MOORE, 178 U. S. 41 (1900), where he said:

> "Taxes of this general character are universally deemed to relate, not to property eo nomine, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. Such taxes so considered were known to the Roman law and the ancient law of the continent of Europe. Smith's Wealth of Nations, London Ed. of 1811, Vol. 3, p. 311. Continuing the rule of the ancient French law, at the present day in France inheritance and legacy taxes are enforced, being collectible as stamp duties. They are included officially under the general denomination of indirect taxes, for the reason that all inheritance and legacy taxes are considered as levied on the 'occasion of a particular isolated act.' This view of the inheritance and legacy tax conforms to the official definition of indirect taxes, among which inheritance and legacy taxes are classed, which prevails in France at the present day. The definition is as follows:
>
> > 'Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange.' " (p. 47)
>
> "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed

them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears:

"Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." (pp. 55-56)

There are two general classes of death duties: probate or estate taxes; and legacy or succession taxes. The subject of an estate tax is the exercise of the privilege of transmitting property at death. The subject of a succession tax is the exercise of the privilege of succession to, or of receiving property at death by devise or descent. The subject of an estate tax constitutes one phase of a transfer at death; the subject of a succession tax constitutes the other phase thereof. This is illustrated by the opinion of Mr. Justice Stone in STEBBINS v. RILEY, 268 U. S. 137 (1925), at page 144:

"There are two elements in every transfer of a decedent's estate; the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation."

Mr. Justice Stone had previously said (page 141):

> "*The subject-matter of an inheritance taxing statute may be either the transmission or the exercise of the legal power of transmission of property by will or descent* (United States v. Perkins, 163 U. S. 625, 629, 16 S. Ct. 1073, 41 L. ed. 287; Plummer v. Coler, 178 U. S. 115, 125, 20 S. Ct. 829, 44 L. ed. 998; New York Trust Co. v. Eisner, 256 U. S. 345, 41 S. Ct. 506, 65 L. ed. 963, 16 A. L. R. 660), or it may be the legal privilege of taking property by devise or descent (Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 S. Ct. 594, 42 L. ed. 1037; Knowlton v. Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969; Campbell v. California, 200 U. S. 87, 26 S. Ct. 182, 50 L. ed. 382)." (Italics ours.)

The object of an estate tax, or that upon which the burden falls, is the interest in property which ceases at the decedent's death, whereas the object of a succession tax is the interest to which the heir, devisee or legatee succeeds. In this connection, Mr. Justice White, in KNOWLTON v. MOORE, supra, said (page 77):

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation."

See also Y. M. C. A. v. Davis, 264 U. S. 47 (1924).

All death duties, whether estate or succession taxes, have this much in common: that the event upon which the tax is imposed and the occurrence of which (insofar as the

Federal Government is concerned) imparts to the exaction the quality of an indirect tax, is *the transfer or transmission of property at death.* For if there is no transfer at death, it necessarily follows that neither the privilege of transmitting property at death, nor the privilege of succeeding to property at death has been exercised.

The general nature of the tax intended to be imposed by Section 401 of the Revenue Act of 1921, and the several similar Revenue Acts, has been considered in numerous decisions of this Court. From them it clearly appears that the intent of the Congress was to impose an estate tax upon the transmission by the decedent at his death of the various interests in property the values of which are directed by the Act to be included in the value of the gross estate and which mediately become included in the net estate. See opinion of Chairman Horner, of the United States Board of Tax Appeals, in Appeal of Root, 5 B. T. A. 696. The subject of the tax is the exercise by the decedent of the privilege of transferring at his death the property interests included in the net estate. The object of the tax, or the interest upon which it is chargeable and out of which it is deductible, is the interest which ceases at death, rather than the interest to which the heir, devisee or legatee succeeds.

Thus, in Y. M. C. A. v. DAVIS, 264 U. S. 47 (1924), Mr. Chief Justice Taft said (p. 50):

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties, as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death."

In EDWARDS v. SLOCUM, 264 U. S. 61 (1924), this Court, through Mr. Justice Holmes, said (p. 62):

> "But this is not a tax upon a residue; it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in Knowlton v. Moore, 178 U. S. 41, 49, 77, 20 Sup. Ct. Rep. 747, 44 L. ed. 969. It comes into existence before, and is independent of, the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 20 Sup. Ct. Rep. 751, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.'"

Similarly, in CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327 (1929), it was held (p. 334):

> "The statute in terms taxes transfers. *Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death.*" (Italics ours.)

In REINECKE v. NORTHERN TRUST CO., 278 U. S. 339 (1929), this Court said (p. 347):

> "*In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred.*" (Italics ours.)

See also NEW YORK TRUST CO. v. EISNER, 256 U. S. 345, 349 (1921); GREINER v. LEWELLYN, 258 U. S. 384 (1922); NICHOLS v. COOLIDGE, 274 U. S. 531, 537 (1927).

From the foregoing decisions it becomes apparent that the Federal Estate Tax is an indirect tax only when and because it is imposed on the exercise of the privilege of transmitting property at death. A tax which purports to be an estate tax, but which actually reaches property not transferred by the decedent at his death, or the transmission of which is not occasioned by his death, is an excise in form only; in reality it is a direct tax, imposed solely by virtue of the ownership and possession of the property so reached by the tax. See Bromley v. McCaughn, 280 U. S. 124 (1929). Insofar as the Congress, by Section 402 of the Revenue Act of 1921, has required the inclusion in the value of the decedent's gross estate of the value of property transferred by him at his death, it has merely exercised its undoubted power to lay an indirect tax upon the transfer of property at death, measured by the value of the interest which passes thereby. But to the extent that it has required the inclusion in the value of the gross estate of the value of any property not transferred at death, it has attempted to exercise a power expressly denied it by the Constitution, the power to levy unapportioned direct taxes. It is immaterial that the tax is in form an estate tax; for it is the substance, not the form, that determines the nature of a tax. DAWSON v. KENTUCKY DISTILLERIES AND WAREHOUSE CO., 255 U. S. 288, 292 (1921).

In NICHOLS v. COOLIDGE, supra, an unsuccessful attempt was made to subject to the Federal estate tax, imposed by the Revenue Act of 1919, certain property not transferred by the decedent at death. In his opinion, Mr. Justice McReynolds said (p. 541):

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. *But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond*

them. Taxes are very real things and statutes imposing them are estimated by practical results." (Italics ours.)

Unless, therefore, upon the death of one tenant by the entirety his interest in the property held by himself and his spouse as tenants by the entirety is transferred to the surviving tenant, the inclusion of the value of such interest in the decedent tenant's gross estate constitutes the imposition of a direct tax under the guise of an indirect tax.

Property can be said to pass at death, so as to constitute the proper subject of an estate tax, only when death is the occasion of severing the decedent from the unlimited power of control over the present and future disposition of such property after his death. Obvious examples of transfers at death are where property passes by will or under the intestate laws. In such cases it is within the power of the decedent at any time prior to his death to alter or direct the present and future course of the property; it passes from his complete control only at death.

This Court has, on previous occasions, considered the nature of other taxable transfers occasioned by death.

In CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327 (1929), the facts were briefly as follows: The decedent had procured three insurance policies on his life, his wife being named therein as beneficiary. In all three policies the power to change the name of the beneficiary was reserved solely to the decedent. The decedent died without having exercised any of the reserved powers. It was contended that the proceeds of the insurance policies could not be included in the decedent's gross estate for estate tax purposes because they were not transferred by the decedent at his death. This contention was disposed of in the opinion of Mr. Justice Stone as follows (pp. 334-5):

"But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, *as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.*

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 38 S. Ct. 36, 62 L. ed. 143; see Burlingham v. Crouse, 228 U. S. 459, 33 S. Ct. 564, 57 L. ed. 920, 46 L. R. A. [N. S.] 148), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, (Domestic Relations Law, N. Y., Chapter 14, Consol. Laws, Sec. 52); Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433; Guardian Trust Co. vs. Straus, 139 App. Div. 884, 123 N. Y. S. 852, affirmed 201 N. Y. 546, 95 N. E. 1129, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death." (Italics ours.)

And at pages 336-7:

"Such an outstanding power residing exclusively in a

donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

Related principles were involved in REINECKE v. NORTHERN TRUST CO., 278 U. S. 339 (1929). The decedent had created by deed seven trusts. In two of the deeds of trust it was provided that the income from the trusts was to be paid to the settlor during his lifetime and after his death the income, and, ultimately, the principal were to be paid to certain designated beneficiaries. A power of revocation of these two trusts was reserved to the settlor alone. Under the provisions of the remaining five trusts, the income was to be paid to certain designated life tenants other than settlor, and, after the settlor's (decedent's) death, the corpus was to be paid to the remaindermen. "With respect to each of these five trusts a power was also reserved 'to alter, change, or modify the trust,' which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of one of the trusts, by the settlor and a majority of the beneficiaries named, acting jointly." (p. 344) The settlor died without any of the powers of revocation having been exercised.

As to the two trusts, where the decedent had the exclusive power of revocation, it was held that the transfers were not completed until death and could therefore be subjected to an estate tax. ". . . a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death." (p. 345)

As to the remaining five trusts, however, it was held that no transfer occurred at the decedent's death, for the following reasons (page 346):

"If it be assumed that the power to modify the trust

was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

This Court further pointed out in the Reinecke case that the mere fact that a transfer is intended to take effect in possession or enjoyment at or after death of the transferor, who has not retained any possession or enjoyment, is not, in itself, sufficient to render the transfer incomplete until death and so taxable as a transfer at death (pp. 347-9).

It will be noted that in each of the above instances where a transfer at death occurred, the decedent, up to the very moment of his death, could have defeated the right of the transferee to the property after his death by the exercise of powers of control vested in him alone. The transfers were incomplete until the decedent's death, because then, for the first time, the property passed beyond the possibility of recall by him. On the other hand, in the case of the five trusts in the Reinecke case, the transfers, as to the transferor, were complete the moment (prior to death) the trusts were created because his exclusive power to control the future ownership and enjoyment thereof ceased at such time. In this connection Judge Woolley, speaking for the Circuit

Court below in the Provident Trust Company case, after referring to the Reinecke and Chase National Bank cases and Saltonstall v. Saltonstall, 276 U. S. 260 (1928), said (Record, p. 13):

> "In all these cases the transfers had not been completely effected or the privilege of succession or the right of possession or enjoyment fully exercised before death. But in all death terminated reserved powers of control and effected final transfers to the advantage of those who had obtained the properties subject to the powers."

In MAY v. HEINER, October Term, 1929, No. 311 (decided April 14, 1930—not yet reported), Mrs. May, the decedent, had on October 1, 1917, created a trust, under the terms of which the income from the trust property was to be paid to her husband during his lifetime, and, after his death, to herself during her lifetime. Upon her death the principal was to be divided among her children, their distributees, or appointees. The Commissioner of Internal Revenue attempted to include the value of the trust property in the decedent's gross estate for estate tax purposes, claiming that the trust was one created "in contemplation of or intended to take effect in possession or enjoyment at or after . . . death", within the meaning of Section 402 (c) of the Revenue Act of 1918. This Court, in reversing judgment for the Commissioner, stated:

> "The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event.
>
> "The transfer of Oct. 1, 1917, was not made in contemplation of death within the legal significance of those words. *It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the*

trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." (Italics ours)

Thus it will be seen that the privilege of transmitting property at death is exercised if, and only if, then for the first time the decedent parts with the exclusive and unlimited power to control the present and future disposition of the property.

Keeping these principles in mind, the next question is whether the interest of a tenant by the entirety under the law of Pennsylvania is transferred, upon his death, to the surviving tenant, as a result of an exercise by the decedent tenant of the privilege of transmitting property at death. The answer to this question depends upon the nature and incidents of an estate by the entirety as it exists under the law of Pennsylvania.

B. Under the Law of Pennsylvania, which is Controlling, no Interest in Property held by a Decedent and Spouse as Tenants by the Entirety Passes at the Death of one Tenant, to the Survivor, by Virtue of the Exercise by the Decedent Tenant of the Privilege of Transmitting Property at Death; and, therefore, in such Case the Subject or Event upon Which the Tax Must be Predicated is Wanting.

The common law doctrine of tenancy by the entirety, unmodified, was at an early date incorporated into and has always been retained as a part of the law of Pennsylvania. Being based on the marital relationship, the estate can be created only by or between husband and wife. The fundamental nature of this estate was considered at length by the Supreme Court of Pennsylvania in the leading case of BEIHL v. MARTIN, 236 Pa. 519 (1912). Speaking for the Court, Mr. Justice Stewart said (pp. 522-3):

"It may be that because of modern innovations on the common law respecting the property rights of married women, the venerable estate known as estate by entireties has outlived the purpose of its creation and is out of harmony with present conditions. However, this may be, if change is desired, it must come through legislative action and not through judicial construction. This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character we have been careful, as all our cases show, to give effect to these peculiar incidents which naturally and logically attach, especially to its chief distinguishing incident which exempts it from the ordinary legal process to which all other estates are subject. Fundamentally the estate rests on the legal unity of husband and wife; it is therefore a unit not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct yet to legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one while the rights of survivorship remain to the other, that other takes no new title or estate. 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unity made up of divisible parts; that of a husband and wife is also a unity, but is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either, the survivor takes a new estate. He acquires by survivorship the moiety of his deceased co-tenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either, the survivor takes no new estate. It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct

merely reduces the legal personage holding the estate to an individual identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries.' Stuckey vs. Keefe, 26 Pa. 397."

The legal unity of husband and wife has not been abolished in Pennsylvania, nor has the nature of an estate by the entirety been in any way affected by the various Married Women's Property Acts.

In DIVER v. DIVER, 56 Pa. 106 (1867), it was argued that the effect of the Act of April 11, 1848, P. L. 536, was to destroy estates by the entirety. The Supreme Court of Pennsylvania, in an opinion by Mr. Justice Strong, later of this Court, held (p. 109):

> "The design of the legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property by removing it from under the dominion of the husband. . . . The Act therefore no more destroys her union with her husband than does a settlement of property for her own use."

A similar contention in respect of the Act of June 8, 1893, P. L. 344, was rejected in the case of MEYER'S ESTATE (No. 1), 232 Pa. 89 (1911). The Court said (p. 91):

> "The contention of appellant, is that this venerable and unique common-law estate has been abolished in Pennsylvania by the Act of June 8, 1893, P. L. 344, not in express terms, but by unavoidable implication. The Act of June 8, 1893, was meant as a substitute for the earlier Act of June 3, 1887, P. L. 332, which it expressly repeals. The primary object in each was the same—to emancipate married women from restraints and disqualifications with which they had been fettered by the common law. The later act embraces within its

scope all that was gained for married women by the earlier; and at the same time it removes other disqualifications which the earlier left undisturbed; but it can no more be affirmed of one than of the other, that it discloses a legislative purpose to change the nature of any estate which married women could theretofore have acquired, or destroy or in any way interfere with the legal unity which characterizes the relation of husband and wife, in deference to which and for its better protection perhaps, this peculiar estate by entireties was invented."

In GASNER v. PIERCE, 286 Pa. 529 (1926), the Supreme Court of Pennsylvania, in an opinion by Mr. Justice Sadler, said (pp. 531-2):

"The property in question was admittedly owned by Mr. and Mrs. Pierce, and, as a result, a tenancy by entireties arose, which has been defined as an interest 'held by a husband and wife together so long as both live, and, after the death of either, by the survivor so long as the estate lasts:' 13 R. C. L. 1096. 'The essential characteristic of (the estate) is that each spouse is seized of the whole or the entirety and not of a share, moiety, or divisible part. . . . There is but one estate, and, in contemplation of law, it is held by but one person:' 30 C. J. 564; 13 R. C. L. 1114. This interest, arising from the unity of person, has not been abolished by our so-called Married Women's Acts (13 R. C. L. 1101), passed April 11, 1848, P. L. 536 (Diver v. Diver, 56 Pa. 106), June 3, 1887, P. L. 332 (Bramberry's Est., 156 Pa. 628), or June 8, 1893, P. L. 344: Meyer's Est. (No. 1), 232 Pa. 89. Nor is it affected by the more recent legislation (May 24, 1923, P. L. 446; May 13, 1925, P. L. 649), authorizing the sale of such estates, when ordered to secure support of the wife, or after divorce has been granted."

The "more recent legislation" referred to in the foregoing quotation, and likewise the Act of May 10, 1927, P. L. 884 (West's Penna. Statutes, 1928 Supp. Secs. 10172b-1 to 4) "authorizing the sale of such estates, when ordered, to secure support of the wife, or after divorce has been granted," do not, of course, provide a means whereby one tenant can, at his will, sever the estate. For, one tenant can secure a support order or a divorce only if the other tenant, by his actions, has furnished the grounds therefor.

An estate by the entirety is not terminated by divorce of the tenants. O'Malley v. O'Malley, 272 Pa. 528 (1922), at 532: "We have held, however, that after a divorce the estate retains the incidents which pertained to it at its inception: Alles v. Lyon, 216 Pa. 604."

Because each tenant by the entirety is seised of the whole, and not of a share or moiety, certain well-recognized incidents naturally attach to this estate.

Each tenant, from the inception of the estate, is entitled to the entire use and enjoyment of the whole estate. The following statement of Montague, C. J., in Plowden, 58, was quoted with approval in McCURDY v. CANNING, 64 Pa. 39 (1870), at pages 40-41:

> " 'the husband has the entire use and the wife has the entire use, for there are no moieties between husband and wife.' "

In MEYER'S ESTATE (No. 2), 232 Pa. 95 (1911), the Court, holding that husband and wife, tenants by the entirety, could not be required to enter security for the protection of the husband's trustee in bankruptcy, in the event of the husband's surviving the wife, said (p. 96):

> "The wife's right to present enjoyment of the estate is not to a part, but to all of it; and this may not be denied her in order to protect a contingent interest of one claiming through the husband. To impose such con-

dition upon the exercise and enjoyment of her right, as was here directed, resolves the estate into a tenancy in common. *Being an estate by entirgties, neither husband nor wife could, under any circumstances, require an accounting by the other; nor could either restrain the other against consuming more than an equal part.*" (Italics ours.)

Since each tenant is entitled to possession of the whole, it follows that either tenant can by his or her sole act rent the property, and that payment of rent by the lessee to either husband or wife constitutes a full discharge: GASNER v. PIERCE, 286 Pa. 529 (1926). For the same reason, where husband and wife own a mortgage as tenants by the entirety, after the death of the wife the husband is entitled to receive and retain *all* of the interest accruing prior to the wife's death; the wife's personal representative has no right thereto whatever: McLAIN, Ex'r, v. HINDEN, 10 District and County Reports 663 (1927).

A tenancy by the entirety cannot be severed by partition proceedings: McCURDY v. CANNING, 64 Pa. 39, 41 (1870). "No action of *partition*, or *waste*, or *account*, or *ejectment*, can be maintained by one against the other:" STUCKEY vs. KEEFE'S EX'RS., 26 Pa. 397, 401 (1856).

During the joint lives of husband and wife, the estate can be terminated only by their joint act. Thus, in MEYERS' ESTATE (No. 1), 232 Pa. 89, 94 (1911), the Court said:

> "In estates of this kind, husband and wife are not joint tenants or tenants in common, but both are seized of the entirety, per tout et non per my. As a consequence neither can dispose of any part without the consent of the other, but the whole must remain to the other."

The Superior Court of Pennsylvania, in Milano et ux v. Fayette Title and Trust Co., 96 Pa. Super. Ct. 310

(1929), held that money deposited in a bank in the joint names of a husband and wife could be drawn out only on checks signed by both, and that the bank was liable for money paid out on checks signed only by the husband. Judge Keller, speaking for the Court, said (p. 314):

> "The right of survivorship of a true tenancy by entireties, which is one of its chief incidents, cannot be destroyed but by the joint act of the two: Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060, 1062. Neither husband nor wife can sever a true tenancy by the entirety: Palmer v. Mansfield, 222 Mass. 263, 110 N. E. 283, 284; Marble v. Jackson, 245 Mass. 504, 139 N. E. 442, 444."

See also McCURDY v. CANNING, 64 Pa. 39, 41 (1870); PENNSYLVANIA TRUST CO. v. MISCHIK, 96 Pa. Super. Ct. 255 (1929).

Neither husband nor wife can dispose of their respective interests, not even their expectancy of survivorship, in property held by themselves as tenants by the entirety, without the consent of the other. The reason for this is clearly set forth in the following quotation from BEIHL v. MARTIN, 236 Pa. 519, 527-8 (1912):

> "A little reflection upon the nature of the estate by entireties should make it apparent, we think, that while the estate continues it is utterly impossible for either party, without the other joining, to sell or assign his or her interest therein, even the expectancy of survivorship. The rights of the parties are fixed by the deed of conveyance to them, and by that instrument each took an entirety made up of indivisible parts. Any alienation by one, the other not consenting, of any interest whatever in the estate, if allowed, would be an abridgement, pro tanto, of the rights of the other. By their joint act they admittedly have the right to sell and dispose of the whole estate; by their joint act they

> may strip the estate of its attributes and create a wholly different estate in themselves; but neither can divest himself or herself of any part without in some way infringing upon the rights of the other."

It was further decided in the above case that neither the husband's interest nor his expectancy of survivorship could be taken in execution at the suit of a separate creditor, the Court saying (p. 528):

> "Now stating it broadly but correctly, nothing can be taken in execution and sold as the property of a debtor except property over which the debtor has the right of disposition by sale or otherwise. If then the husband cannot sell or dispose of his expectancy of survivorship, it follows that it may not be taken in execution."

Furthermore, a judgment against either the husband or the wife does not constitute an encumbrance upon property held as tenants by the entirety. "If the husband may not alien his right of expectancy, and if because of this the expectancy may not be taken in execution—since in either case it would be an appropriation of the wife's right of property in that it would deprive her of the right to sell with the husband's consent—for equal reason a judgment operating as a lien upon the husband's expectancy would be an interference with the wife's right of alienation with the consent of the husband, except as that lien is divested by such sale:" BEIHL v. MARTIN, supra (p. 528). See also A. HUPFEL'S SONS v. GETTY, 292 Fed. 178 and 299 Fed. 939.

An estate by the entirety remains entirely unaffected by bankruptcy proceedings against one tenant, and the trustee in bankruptcy acquires no rights whatever with respect to the bankrupt's interest in the estate. See Beihl v. Martin, supra; Meyer's Estate (No. 1), 232 Pa. 89 (1911);

Meyer's Estate (No. 2), 232 Pa. 95 (1911); Weiss v. Beihl, 232 Pa. 97 (1911).

Each tenant being seised *per tout et non per my*, upon the death of the one tenant, the survivor receives no new estate; he merely *continues* in the possession and enjoyment of the entire estate vested in him under the terms of the creative instrument, as the following quotations from Beihl v. Martin, supra, clearly demonstrate:

> "Each is seised of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate." (pp. 522-3)
>
> "There remains to the husband a right of survivorship, by virtue of which, in case he survive the wife, while taking no estate, yet because the entirety in the wife is by her death extinguished, his entirety embraces every interest in the estate." (pp. 526-7.)

Upon the death of one tenant, his interest in the property is simply extinguished. It cannot pass to his heirs or under his will, nor is it transferred to the surviving tenant. The moment the estate was created the surviving tenant became invested with the entire fee, together with the right of immediate possession and enjoyment of the whole thereof. After the decedent's death the surviving spouse holds precisely the same interest as before; *she receives no additional rights which were formerly enjoyed, possessed or controlled by the decedent;* her rights are only those which accrued to her under the terms of the original grant, and which vested irrevocably in her upon the creation of the estate.

Since no interest formerly enjoyed, possessed or controlled by a decedent tenant by the entirety passes to the surviving tenant at the decedent's death, it has been held in Pennsylvania that a succession tax cannot be imposed at death upon the interest of a tenant by the entirety. In

ESTATE OF HENRY G. FINK, DECEASED, 6 Erie County Law Journal 281 (1922), it was contended by the Commonwealth of Pennsylvania (taxing authority) that the surviving tenant acquired the decedent's interest in the estate by the entirety as a result of a transfer intended to take effect in possession or enjoyment at or after death, and that the provisions of the Pennsylvania Inheritance Tax Law taxing such transfers were therefore applicable. The Court said, in rejecting this contention:

> "Whenever a deed is made to husband and wife with the right of survivorship, they take by entireties, and the right to present possession or enjoyment arises at once in favor of both grantees and is not postponed until the death of one, or dependent upon who may be the ultimate survivor and the whole owner in fee by operation of law." (p. 289)

The foregoing decisions serve to illustrate how the Courts of Pennsylvania have assiduously preserved the fundamental character of an estate by the entirety and the various attributes which naturally and logically attach to it. As Judge Woolley said (Record, p. 14): "A tenancy by the entirety in Pennsylvania retains in their purity all the characteristics of its English origin."

The Legislature, likewise, has always refrained, in inheritance tax matters, from modifying the nature of this estate as it existed at common law and in the Act of May 16, 1929, P. L. 1795, 1797, has expressly excepted estates by the entirety from the operation of the Pennsylvania Transfer Inheritance Tax Law by the following language:

> "(e) Whenever any property, real or personal, is held in the joint names of two or more persons, except as tenants by the entirety, or is deposited in banks or other institutions or depositories in the joint names of two or more persons, except as husband and wife, and

payable to either or the survivor upon the death of one of such persons, the right of the surviving person or persons entitled to the immediate ownership or possession and enjoyment of such property shall be deemed, prima facie, a transfer of one-half, or other proper fraction thereof, taxable under the provisions of this act, in the same manner as though this part of the property to which such transfer relates belonged to joint tenants or joint depositors as tenants in common, and had been bequeathed or devised to the surviving person or persons by such deceased joint tenant or joint depositor by will."

This statute was enacted in order to obviate the effect of the decision in Leach's Estate, 282 Pa. 545 (1925), holding that joint estates were not taxable.

It is the settled law not only of Pennsylvania but of practically all other jurisdictions where tenancy by the entirety, as it existed at the common law, is recognized, that upon the death of one tenant his interest does not pass to the surviving tenant, and that the latter takes no new estate.

In BEDDINGFIELD v. ESTILL AND NEWMAN, 118 Tenn. 39, 100 S. W. 108, 9 L. R. A. (N. S.) 640 (1907), it was held that a husband who murdered his wife is not deprived of his right to property formerly held by himself and his wife as tenants by the entirety; and that a statute, providing that one who shall feloniously kill any person from whom he would be entitled to take property by inheritance, will or otherwise shall forfeit all right to such property, is inapplicable; for the husband acquired no interest in the property through or under his wife.

In PALMER v. TREASURER and RECEIVER GENERAL, 222 Mass. 263, 110 N. E. 283 (1915), it was held that the surviving tenant acquires from the decedent tenant no interest which is subject to a succession tax upon real estate which passes "by the laws regulating intestate succession"

(St. 1909, c. 490, Part IV, Sec. 1, as amended by St. 1912, c. 678, Sec. 1). In so holding, the Court said (pp. 264-5):

"The peculiar nature of a tenancy by the entirety frequently has been considered by this court. It can arise only where the ownership is vested in husband and wife. As was said by Field, J., in Pray v. Stebbins, 141 Mass. 219, 221: 'This tenancy by entireties is essentially a joint tenancy, modified by the common law doctrine that husband and wife are one person.' The difference between a joint tenancy and a tenancy by the entirety is that joint tenants take by moieties and are each seized of an undivided moiety of the whole, per my et per tout, which draws after it the incident of survivorship unless either party in his life time severs the jointure.

"On the other hand neither husband nor wife can sever a tenancy by the entirety. They do not take by moieties but by entireties. Neither can alienate a moiety so as to defeat the title to the survivor in the whole. Shaw v. Hearsey, 5 Mass. 521. Wales v. Coffin, 13 Allen, 213. Pray v. Stebbins, 141 Mass. 219. Hoag v. Hoag, 213 Mass. 50.

"When a tenancy by the entirety is created, the husband and wife take the estate as one person, and they take but one estate. In view of the nature of such an estate, on the death of either husband or wife *no beneficial interest accrues to the other by survivorship so as to create succession, and so no part of the estate was subject to the tax.*

"Upon the death of the testator no estate in the property in question passed to his widow. It belonged to her from the time when the tenancy by the entirety was created. In the event that she survived her husband, upon his death she took no new title by survivorship, but held under the deed by virtue of which she was originally seized of the whole. 21 Cyc. 1198, 1199.

1 Washb. Real Prop. (6th ed.) Sec. 912. Enyeart v. Kepler, 118 Ind. 36.

"Upon the testator's death the estate simply was freed from participation by him. The complete title of a surviving tenant by the entirety is not acquired by intestate succession, but by reason of the nature of the estate. See Attorney-General v. Clark, post, 291; Matter of Klatsl, 216 N. Y. 83." (Italics ours.)

A similar question was involved in the case of Lyon's Estate, 233 N. Y. 208, 135 N. E. 247 (1922), where the Court of Appeals of New York decided that an amendment to the Inheritance Tax Laws of New York (Cons. Laws, c. 60, Sec. 220, subd. 7), which provided that the right of a surviving tenant by the entirety "to the immediate ownership and enjoyment of the property shall be deemed a taxable transfer," had no application to a tenancy by the entirety created prior to the enactment of the amendment (1916), even though the decedent died subsequent thereto, and that the right of the surviving tenant was not taxable. The opinion of Judge Andrews contains a comprehensive statement of the nature of an estate by the entirety and is therefore quoted below at considerable length:

"When on July 31, 1908, a house and lot was conveyed to Edmund Lyon and to Carolyn, his wife, as tenants by the entirety, they became seized of an estate having well recognized attributes. Whatever the original reasoning upon which this estate was based, the rules with regard to it had long become a part of the law of real property consistently enforced in New York. In re Klatsl's Estate, 216 N. Y. 83, 110 N. E. 181. Husband and wife were not joint tenants. One did not acquire the rights and property of the other by survivorship. The fee was indivisible. As an entirety it was vested in both. For this purpose they were con-

sidered one and not two. On the death of either the fee vested in the other, not because there was a transfer of any part of the estate, but because the survivor was the representative of the single ownership. The rule was a technical one. So are many of the rules affecting real estate. We appeal to history and not to logic for the explanation. (p. 211)

* * * * * * * * *

"Whatever power the legislature may have with regard to such estates later created does not extend to those already vested before the adoption of the amendment. In re Pell's Estate, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540, 89 Am. St. Rep. 791. This estate by the entirety with all its incidents was vested in Mr. and Mrs. Lyon in 1910. What was then acquired may not subsequently be diminished by a tax upon that acquisition. As there was no transfer after 1916, there can be no tax. Mrs. Lyon now has what she had in 1910, no more and no less. In re McKelway's Estate, supra." (p. 212)

It is significant that in the foregoing case it was held that the 1916 Amendment could not be accorded retrospective operation. In so holding the Court recognized that a statute which declares that the right of a surviving tenant by the entirety "to the immediate ownership and enjoyment of the property shall be deemed a taxable transfer" effects a radical change in the fundamental nature of an estate by the entirety. The several states concededly have the power to change their respective rules of property. But in so doing they must not disturb vested interests. Under the New York law, prior to 1916, the interest of a decedent tenant by the entirety was not, upon his death, transferred to the surviving tenant. But on the death of a joint tenant, under the New York law prior to 1916, a one-half interest in the joint property was considered to have been transfer-

red, at the death of one tenant, to the survivor. The 1916 Amendment, by its terms, applied to both tenancies by the entirety and joint tenancies. It provided that the right of the surviving tenant in each case shall be deemed to be a taxable transfer of the whole estate. As to tenancy by the entirety, the effect of this Amendment was to create a transfer where formerly none occurred. And because the creation of this transfer involved a material change in the basic character of an estate by the entirety, it could apply only to estates subsequently created. As to estates by the entirety, the Amendment was more than a taxing statute; it constituted a new rule of property.

As to joint tenancies, on the other hand, the Amendment created a transfer of one-half of the joint property where formerly none would occur, and, pro tanto, altered the nature of the estate; but in respect of the remaining half of the joint property, it merely declared what had formerly been the law of New York. As to the one-half, which under the former law was not transferred at death, the Amendment was both taxing statute and rule of property, and so could apply only to estates subsequently created; but as to the other half, which had always been regarded as being transferred at death, it was only a tax law and so could apply to estates created prior to its passage, provided the decedent died subsequent thereto.

The foregoing principles were recognized and applied in In re McKELWAY'S ESTATE, 221 N. Y. 15, 116 N. E. 348 (1917). In this case the Court of Appeals of New York, in an opinion by Judge Pound, held that where husband and wife acquired property as joint tenants, and not tenants by the entirety, prior to the passage of the 1916 Amendment, and the husband died after its passage, one-half of the property jointly held may be taxed, but not all. In pointing out the distinction between a joint tenancy and a tenancy by the entirety, Judge Pound said: "Upon the vesting of an estate by the entirety, both tenants become

seised of the whole estate, and upon the death of one the survivor acquires no new or additional interest by survivorship." (p. 19)

Pennsylvania could, if it saw fit, change the nature of a tenancy by the entirety and provide that upon the death of one tenant his interest shall be transferred to the surviving spouse. But it has not done so. The Congress, however, has no power whatsoever to make any such change. See Cooley, Constitutional Limitations, 8th Ed. Vol. I, p. 11: "The Government of the United States is one of *enumerated powers;* the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national Government assumes to possess." See also Note 3 on page 11, MARTIN v. HUNTER'S LESSEE, 1 Wheat. 304, 326, 4 L. ed. 97, 103, and LINDER v. UNITED STATES, 268 U. S. 5, 69, L. Ed. 819, 45 Sup. Ct. Rep. 446. The Tenth Amendment to the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In HUNT v. BLACKBURN, 128 U. S. 464, 469 (1888), this Court recognized that where land was conveyed to husband and wife, "each became seized of the entirety per tout et non per my; the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant".

In UNITED STATES v. ROBERTSON, 183 Fed. 711 (C. C. A., 7th—1910), certiorari denied in 220 U. S. 616, the question involved was whether the share of a decedent joint tenant to which his co-tenant succeeded was subject to a legacy tax under the provisions of Section 29 of the War Revenue Act of 1898. In its opinion the Court said (p. 714):

"Did the title of defendant to one-half of the

share that James Law possessed in his lifetime vest on the execution of the contract, or did it vest only after the death of James Law? Defendants' insistence upon an affirmative answer to the first alternative comes, we believe, from *a confusion of estates in entirety with estates in joint tenancy. Survivorship is a characteristic of both. In estates by the entirety the title of each is to the whole, and from this it inevitably follows that no adverse act of the one can destroy the right of survivorship in the other. When the one dies the other takes nothing by a new title of survivorship; he merely ceases to divide the enjoyment of an estate of which he was completely seized by virtue of the creative instrument.*" (Italics ours.)

The nature and incidents of the tenancies by the entirety involved in the instant proceedings must be determined according to the law of Pennsylvania. "'It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances'": Clarke v. Clarke, 178 U. S. 186, 191 (1900), quoting from the case of DEVAUGHN v. HUTCHINSON, 165 U. S. 566, 570 (1897).

A recent statement of the same rule is found in the case of EDWARD HINES YELLOW PINE TRUSTEES v. MARTIN, 268 U. S. 458 (1925), where Mr. Justice Stone stated:

> "To avoid the uncertainty and injustice which result from the 'discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right' (Brine v. Insurance Company, 96 U. S. 627), this Court has not hesitated when there has been a

> conflict of decision between it and the State Courts affecting a rule of property within the State, to overrule its own decisions and to follow the State decisions, once it has become evident that they have established a 'rule of property' as a settled law of the State." (p. 464.)

See also UNITED STATES v. TITLE INSURANCE AND TRUST CO., 265 U. S. 472, 486 (1924).

This principle applies in matters of federal taxation, as well as all other matters. UNITED STATES v. ROBBINS, 269 U. S. 315 (1926); TALCOTT v. UNITED STATES, 23 Fed. (2d) 897 (C. C. A., 9th—1928); ALLEN v. HENGGELER, ADM'R, 32 Fed. (2d) 69 (C. C. A., 8th), certiorari denied in 280 U. S. 72A; CROOKS v. HARRELSON, 35 Fed. (2d) 416 (C. C. A., 8th).

Therefore, the interest of a decedent tenant by the entirety is transferred at his death to the surviving tenant, only if the law of Pennsylvania declares that it shall be. But under the law of Pennsylvania, the decedent tenant's interest, instead of being transferred, is wiped out. It does not pass to the survivor, or to any one else. The survivor takes no new estate. Before the decedent's death, the survivor was seized of the entire estate and entitled to the present possession and enjoyment of the whole thereof; after the death she is still seized of the whole and entitled to possession and enjoyment thereof. Death did not terminate any power in the decedent to control or direct the use or enjoyment of the property after his death, by the exercise of which he could have defeated the survivor's right; he never possessed any such power. He could not possibly, at his own will, have defeated the right of the survivor to the property or the use and enjoyment thereof, either before or after his death, either by alienation, partition, the creation of incumbrances, bankruptcy or divorce. After the death of the

tenant, the survivor does not, for the first time, begin to use and enjoy the property. She continues in the possession and enjoyment of the whole property not because the decedent's interest has been transferred to her, not because the decedent has died without exercising reserved powers to deprive her of her estate, but because of and in the exercise of rights irrevocably vested in her by the original grant. This is the situation as it exists under the state rules of property; and this is the situation which the Congress, in taxing the decedent's interest, must accept. It cannot, in order to create a transfer upon which to predicate an estate tax, take away, in derogation of the law of Pennsylvania, the interest of which the survivor became seized and possessed at the time of the creation of the estate and, in its place, substitute the defunct interest of the decedent. Under the law of Pennsylvania there is no transfer. The decedent did not, at his death, exercise (nor did there then terminate) any power of control on his part over the use and enjoyment of the property held under such tenancy which this Court has determined to constitute that "shifting of the economic benefits and burdens of property" which might constitutionally become the proper subject of an estate tax. Because the taxable occasion is absent, there can, therefore, be no estate tax.

The privilege of transmitting property at death is the only privilege upon the exercise of which the Congress, by Section 401 of the Revenue Act of 1921, attempted to impose a tax. Since, in each of the instant cases, this privilege was not exercised by the decedent in respect of his interest in the property held with his spouse as tenants by the entirety, the tax was imposed directly, instead of indirectly, on such interest; and being unapportioned, the tax is unconsitutional.

II.

INSOFAR AS THE APPLICABLE STATUTE REQUIRES THE INCLUSION IN THE VALUE OF THE GROSS ESTATE OF THE VALUE OF PROPERTY NOT TRANSFERRED BY THE DECEDENT IN THE EXERCISE OF THE PRIVILEGE OF TRANSMITTING PROPERTY AT DEATH, IT CONTRAVENES THE FIFTH AMENDMENT OF THE CONSTITUTION.

The objection to the constitutionality of the Act cannot be met by saying that the decedent's interest in an estate by the entirety is merely used as a measure for a tax to be imposed upon the transfer of other property. In the first place, this was not the intent of the Congress as construed by this Court. "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death, and is measured by the value at death of the interest which is transferred": REINECKE v. NORTHERN TRUST CO., 278 U. S. 339, 347 (1929). To the same effect, see CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327, 334 (1929). See also the opinion of Chairman Horner in Appeal of Root, 5 B. T. A. 696.

In NICHOLS v. COOLIDGE, 274 U. S. 531 (1927), an effort was made to justify the imposition, pursuant to the provisions of Section 402, paragraph (c) of the Revenue Act of 1919, of a tax on an interest in property not transferred at death, on the theory "that the challenged subsection only undertakes to tax the transfer from the dead and merely uses the gross estate to measure a charge". (p. 539.) This Court refused to adopt such a construction of the Act, for the reason that the "language of the statute is not consistent with the idea that it utilizes the gross estate merely to measure a proper charge upon the transfer by death". (pp. 540-1.)

But if it were the intent of the Congress to use the value of the decedent's interest in an estate by the entirety merely as a measure for a charge to be imposed on the transfer of other property, the tax would be so arbitrary and capricious as to contravene the due process clause of the Fifth Amendment. This Court has recognized that the imposition of a tax measured by a standard which disregards the distinction between what is taxable in itself and what is not taxable in itself in such a way as to amount to a tax on that which is not taxable, constitutes a taking of property without due process of law. FRICK v. PENNSYLVANIA, 268 U. S. 473 (1925).

In NICHOLS v. COOLIDGE, supra, it was held the Congress was without power to require the inclusion of the value of property not transferred at or in contemplation of death in the measure of a tax to be imposed on the transmission of other property at death. In this case Mr. Justice McReynolds stated, at page 541:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things, and statutes imposing them are estimated by practical results."

And at page 542:

> "Under the theory advanced for the United States the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions not testamentary in character and beyond recall. Property of small value transferred before death may become immensely valuable, and the estate tax, swollen by this, may leave

nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable."

To the same effect see FREW v. BOWERS, 12 Fed. (2d) 625, 629 (C. C. A., 2nd—1926), certiorari allowed in 273 U. S. 682.

III.

CONSIDERATION OF PETITIONERS' ARGUMENT.

In Part II of their argument, Counsel for the petitioners argue that "although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a shifting of economic benefits of property upon the decedent's death, occasioned by the death". However, in order to show that the "shifting" which constitutes the subject of an estate tax has occurred, no effort is made to point out any interest of the decedent tenant, which was, at his death, transferred to the surviving tenant in the exercise of the privilege of transmitting property at death; nor is any attempt made to prove that death terminated absolute powers vested in the decedent to deprive the surviving tenant of her interest in the property, or in any way to interfere with her possession and enjoyment thereof. It is merely contended that "all the interests of the decedent spouse, including his right of survivorship, are terminated at his death". Reduced to its essence, the argument of the petitioners is, that the bare cessation of an interest at death may constitute the subject of an estate tax. This argument utterly ignores the fundamental principle laid down

in Knowlton v. Moore, supra, and frequently reaffirmed by this Court, that "the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its *transmission* or receipt by will, or as the result of intestacy" (p. 47, Italics ours). It also overlooks an all important factor, namely, that the surviving tenant's actual use and enjoyment of the property did not first come into existence upon the death of the decedent, but began upon the creation of the estate prior to death, which in each of the instant cases was admittedly not in contemplation of death.

The decisions of this Court in the cases of CHASE NATIONAL BANK v. UNITED STATES, supra, and REINECKE v. NORTHERN TRUST CO., supra, are relied upon as authority for the proposition that, merely because the decedent's interest in the property held as tenants by the entirety has been terminated at death, such property may therefore be subjected to an estate tax.

It will be recalled that, in the Chase National Bank case, the decedent had taken out several policies of insurance on his life, naming his wife as beneficiary, but reserving solely to himself the power to change the name of the beneficiary at any time prior to his death. The decedent died without having changed the beneficiary. It was held that the inclusion of the proceeds of the policies in the value of the gross estate did not constitute the imposition of a direct tax, nor was the due process clause of the Fifth Amendment thereby violated. In so holding, this Court distinctly recognized that the tax is imposed "on the privilege of transferring the property of a decedent at death" (page 334). It also recognized that the cessation at death of an interest in property may result in a transfer of property at death, providing the interest which has ceased includes the unlimited power to control the present and future disposition of the property, both dur-

ing and after the decedent's lifetime. The nature and scope of the decedent's interest in the insurance policies were defined in the opinion of Mr. Justice Stone, from which the following excerpts are taken:

> "But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them." (page 334).
>
> "A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors . . . and which may, under local law applicable to the parties hereto, subject them in part to the payment of his debts . . . is by no means the least substantial of the legal incidents of ownership, . . ." (page 335).

It was then pointed out that the retention by the decedent of such a comprehensive power, whereby he could, at his will, recall or otherwise defeat the gift of the interest in the policies to the beneficiary, rendered such gift incomplete until his death, at which time the power was terminated.

> "Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers." (pages 336-7.)

The controlling factor in the Chase National Bank case was quite obviously the retention until death by the dece-

dent of the power to direct or control the use or economic enjoyment of the property both during his lifetime and after his death.

> ". . . we think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, *so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control* at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, Chanler v. Kilsey, 205 U. S. 466, 27 S. Ct. 550, 51 L. Ed. 882." (page 338, Italics ours)

In concluding it was stated:

> "As it is *the termination of the power of disposition* of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, *together with all the other interests of decedent transferred at his death.*" (page 339, Italics ours)

In the foregoing case the transfer remained incomplete, as to the decedent, until death because he could at any time prior thereto have recalled it. The termination by death of the decedent's interest in the policies resulted in a transfer at death because the interest which ceased

included the power to take away or otherwise destroy the beneficiary's interest. The tax in this case was not imposed upon the cessation of the decedent's interest in the property: it was imposed on the *transfer at death* resulting from or completed by the cessation of the decedent's interest in the property.

In the case of REINECKE v. NORTHERN TRUST CO., supra, (the facts of which are stated at pages 14 and 15 of this brief), it was held that in the case of the two trusts created by the decedent during his lifetime, where the power to revoke at any time prior to his death was reserved to himself alone, the transfers to the beneficiaries were completed only at death. As in the Chase National Bank case, the interest in the trust property retained by the decedent until his death included the exclusive and unlimited power to control the present and future ownership and enjoyment of the property. Consequently, it was held that termination of such an extensive interest at death completed the transfer commenced prior thereto. The tax was imposed upon the transmission of the trust property at death resulting from the termination of the power to revoke, but not upon the termination itself. ". . . a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death". (page 345.)

It was, however, recognized in the Reinecke case that the operative moment at which a transfer becomes complete as to the transferor is not necessarily postponed by reason of the retention by the transferor of an interest which does not include the exclusive and unlimited power to control the future disposition of the property. In the case of the five trusts the settlor (decedent) reserved to himself the "power to supervise the reinvestment of trust funds, to require the trustee to execute proxies, to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to ap-

point successor trustees". In addition to the above powers of management the decedent also reserved to himself the power to "alter, change or modify" the trusts with the consent of the single beneficiary in the case of four of the trusts, and with the consent of a majority of the beneficiaries in the case of the fifth trust. It was held that the transfers of the beneficiaries' interests in these five trusts were completed, as to the transferor, the moment the trusts were created, regardless of the reserved powers. Mr. Justice Stone said (pages 346-47):

> "If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial interest in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.
>
> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall

> the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax."

Recognizing that, because the transfers in the case of these five trusts were completed prior to the decedent's death and also prior to the passage of the applicable Revenue Act, there would be serious doubts as to the constitutional validity of the Act, if construed so as to tax such transfers as transfers at death, this Court construed it in such a way as to exclude these particular trusts from its operation.

The Chase National Bank and the Reinecke cases do not hold that an estate tax may be imposed merely upon the cessation of an interest. To the contrary, it is explicitly affirmed in both cases that *the subject of an estate tax is the exercise of the privilege of transmitting property at death.* These cases are authority for the proposition that an estate tax can be imposed upon the transfer of property at death resulting from the cessation of an interest. But the mere cessation of every interest in property does not result in a transfer at death. Termination of an interest in property at death results in the exercise by the decedent of the privilege of transmitting property at death (which alone is the subject of an estate tax), only when the interest which has terminated embraces the exclusive and unlimited power to control the use or economic enjoyment of the property both during the lifetime and after the death of the decedent. A transfer of property by a decedent during his lifetime remains, as to him, incomplete until death, only if he reserves to himself alone the unrestricted power to control the present and future disposition of the property. The reason for this is because a transfer is complete, as to the transferor, at the

operative moment when it passes beyond possibility of recall by him at his will.

The death of a decedent tenant by the entirety does not result in the termination of any interest comparable to that vested in the decedent in the Chase National Bank case, or in the settlor (decedent) of the two trusts in the Reinecke case. The decedent tenant by the entirety has no power at his will to take his spouse's interest away from her and either keep it for himself or give it to another. He could not sever the estate without the consent of his spouse. He could not dispose of his right to the possession and enjoyment of the property during their joint lives. He could not even convey his expectancy of survivorship. The property could not be subjected to the payment of his debts, nor could it in the least way be affected by bankruptcy proceedings against him. In short, his wife's interest in the estate and right to the possession and enjoyment of the property is entirely beyond his control or interference. Nor does his death first bring about his spouse's enjoyment of the economic benefits of the property. The fact that the decedent tenant may have furnished the consideration for the purchase of the property held as tenants by the entirety is of no moment. The effect of the creation of the estate is to make an absolute gift to the wife of an immediate interest in the whole property as tenant by the entirety. The gift is complete, as to the donor, upon the creation of the estate because it is irrevocable. After the decedent tenant's death the survivor enjoys the identical estate which she enjoyed prior thereto; and this interest was, from the inception of the estate, free from any control by the decedent. The decedent tenant, has, during his lifetime, even less control over the interest of the surviving tenant than did the settlor of the five trusts in the Reinecke case have in respect of the trust estates. Therefore, the termination by death of the decedent tenant's interest in the estate by

the entirety does not have the effect of completing the original transfer of an interest in the estate to the surviving tenant. The only result of his death was to obliterate his interest: it did not render absolute a transfer, theretofore revocable or partial.

On page 16 of the brief for the United States in the Tyler case an effort is made to regard as immaterial this absence of the power in the decedent tenant to divest the interest of the surviving tenant. It is difficult to see how the single feature upon which the decision of a particular case (Reinecke case) is based can be dismissed as inconsequential. That the power of control is not immaterial is most forcefully indicated by the fact that in the case of the five trusts in the Reinecke case, where it was absent, this Court held that the transfer was complete, as to the transferor, the moment the trusts were created.

In determining whether or not the privilege of transmitting property at death has been exercised by the decedent tenant, the test is not whether the interest of the surviving tenant became absolute upon his death. As to the settlor of the five trusts in the Reinecke case, the transfers were completed upon their creation, although the interests of the beneficiaries did not necessarily become absolute until the settlor's death; for the trusts might have been revoked during his lifetime with the consent of the single beneficiary in the four trusts and a majority of the beneficiaries in the fifth case. (In this connection, see the distinction between estate and succession taxes drawn by Mr. Justice Stone, in referring to Saltonstall v. Saltonstall, supra, at pages 335-6 of the Chase National Bank case.)

In FIDELITY-PHILADELPHIA TRUST COMPANY v. McCAUGHN, 34 Fed. (2d) 600 (C. C. A., 3rd), certiorari denied in 280 U. S. 80 A, it was held that the exercise of a power of appointment by a decedent constitutes the exercise of the privilege of transmitting prop-

erty at death, and can therefore be subjected to an estate tax. In such a case, as in the Chase National Bank case and the two trusts in the Reinecke case, the decedent possessed up to the very moment of his death the exclusive power to control the disposition of the property after his death. But a decedent tenant by the entirety possesses no such power, nor does he, by any means, have the exclusive use or enjoyment of the property. It is significant that although this case was decided a short time prior to the cases involved in the instant appeals and by the same Court, yet no mention was made of it in Judge Woolley's opinion.

At page 16 of the brief for the United States in the Tyler case, it is stated that where an owner of property conveys a vested remainder, reserving possession for his life, upon his death there is a transfer of the remainder. McCaughn v. Girard Trust Co., 11 Fed. (2d) 520 (C. C. A., 3d), is cited as authority for this proposition. This case also was decided by the same Court as decided the Provident Trust Company and Girard Trust Company cases. In McCaughn v. Girard Trust Co., the question decided by the Court was one of statutory construction and not of constitutional power. In FREW v. BOWERS, 12 Fed. (2d) 625 (C. C. A. 2d); certiorari allowed in 273 U. S. 682, and subsequently withdrawn by the Government, (cited in Nichols v. Coolidge, 274 U. S. 531, 542), under an identical set of facts, it was held that the inclusion in the gross estate of the value of property transferred irrevocably by the decedent to a trustee, to pay the income to the decedent for life and upon his death to pay the principal to designated beneficiaries, constituted the imposition of an arbitrary and whimsical tax, in violation of the due process clause of the Fifth Amendment. In both cases the property was conveyed to the trustee prior to the date of passage of the applicable Revenue Acts (as well as prior to the date of passage of the Rev-

enue Act of 1916); in both cases the trusts were irrevocable; in both cases the decedents reserved to themselves the income for life. In Frew v. Bowers, where the constitutional question was raised, it was decided that the transfer was complete upon the creation of the trust. If the transfer had remained incomplete until the decedent's death, no objection could have been raised to the inclusion of the property in the gross estate, even though the trust had been created prior to the passage of the applicable Revenue Act. Reinecke v. Northern Trust Co., supra.

Doubt as to the correctness of the result in the case of McCaughn v. Girard Trust Co. is expressed in the opinion of Judge Dickinson in the case of Carnill, Ex'rx., v. McCaughn, 30 Fed. (2d) 696, (D. C. E. D. of Pa.) (now pending in the Circuit Court of Appeals of the 3rd Circuit). In refusing to follow the Girard case, he said (page 699):

> "Here these two truths are present, because there was a vested remainder and a life estate in the same property. The doctrine of the Girard case would in consequence apply. The real question is whether there has not been since the Girard case a modification of the doctrine there (and in many other cases) laid down, particularly since the rulings in the Cooldige case (supra), and in the Reinecke v. Northern Trust Company and Chase National Bank v. United States opinions which have just been handed down. We think there has been this modification".

The views of Judge Dickinson are borne out by the decision of this Court in MAY v. HEINER, supra.

Furthermore, the nature and incidents of an estate by the entirety and an irrevocable trust, with life estate reserved to the settlor and remainder to another, are entirely dissimilar. In the case of the former, each tenant becomes invested, upon the creation of the estate, with a

present right to the use and enjoyment of the *whole*. Upon the decedent tenant's death his usufruct of the property does not pass to the surviving tenant; it merely ceases. The surviving tenant continues to exercise the identical right to the use and enjoyment of the property which she exercised prior to the decedent's death.

On the other hand, at the time of creation of the irrevocable trust, the present right to the economic benefits of the property is vested in the life tenant alone. The remainderman receives only a future right. His usufruct of the property is postponed until the life tenant's death. Upon the death of the life tenant, the economic use and enjoyment of the property might more easily be said to shift from him to the remainderman.

Likewise, the cases dealing with dower, curtesy and other similar interests, which have been cited on pages 16 and 17 of the brief for the United States in the Tyler case, involved interests patently different from those of tenants by the entirety. In Randall v. Krieger, 90 U. S. 137 (1875), this Court defined the inchoate right of dower at common law as follows (p. 148):

> "During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it or wholly take it away. *It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor.* Until that event occurs, the law of descent and distribution may be molded according to the will of the Legislature". (Italics ours)

To the same effect see United States v. Waite, 33 Fed. (2d) 567 (C. C. A., 8th), certiorari denied 280 U. S. 98 A.

The extent of the power of control which the husband, during his lifetime, possesses over the wife's right of dower was pointed out in the opinion of Judge McDermott in ALLEN v. HENGGELER, 32 Fed. (2d) 69, certiorari denied 280 U. S. 72 A.

A portion of his opinion follows (p. 72):

> "Giving full weight to the Nebraska court's description of the wife's interest, the facts still remain that the husband has at least the following very substantial rights in such property:
>
> "He has the exclusive right of possession; the exclusive right to income incident thereto; all of it can be taken for his debts; he has therefore the exclusive right to use it as a basis for credit; he has the right to have it all applied to the payment of his debts upon his death; as to the personal property, he has the further and exclusive right of transfer and disposition and of gift, and can likewise convey real estate if his wife is not a resident of Nebraska; he has the power to convey real estate, without his resident wife's signature, and put his purchaser into possession, and, if his wife predeceases him, the title is absolute. He has every right of ownership, save that he cannot will it without her consent; and as to real estate with a resident wife, his deed is conditioned on him outliving her; and, perhaps, he cannot give away or dissipate property in fraud of her."

A husband quite obviously cannot adversely affect his wife's interest in property held as tenants by the entirety in the same way that he can affect or even defeat her dower interest in his separate property. Property held as tenants by the entirety is not liable for the payment of the husband's debts or administration expenses and is unaffected by judgments or bankruptcy proceedings against him. The husband cannot convey or other-

wise dispose of his interest in the property; he cannot convey his expectancy of survivorship; his deed, instead of being voidable, is absolutely void.

It is said on behalf of the United States that "as to the husband, there was a 'termination by death' of 'legal incidents of property through which its use or economic enjoyment may be controlled'." (Brief in Tyler case, page 18.) It is admitted that "termination by death of legal incidents of property through which its use or economic enjoyment may be controlled" does result in a transfer of property at death. But it is denied that the termination by death of legal incidents of property which do not comprehend the power to control its use or economic enjoyment or for the first time bring to those who come after the economic use or benefit, may result in a transfer of property at death. In Chase National Bank v. United States, supra, the legal incident which was terminated by death was the power to change the names of the beneficiary of certain insurance policies.

The termination by death of the husband's power to prevent the wife from alienating or encumbering property held by them as tenants by the entirety does not effect a transfer at death. By Section 1 of the Act of June 8, 1893, P. L. 344 (West's Penna. Statutes, 1920 ed., Sec. 14569) it is provided that a married woman "may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance". The wife's deed without her husband's joinder is a nullity: Richards v. McClelland, 29 Pa. 385 (1857); Bingler v. Bowman, 194 Pa. 210 (1899). It would scarcely be contended, however, that a wife's separate property is, upon her husband's death, transferred to her and therefore subject to an estate tax.

The release of the property from the "dominion and control" of the decedent tenant, brought about by his death, does not operate as a transfer of the property at

death. His dominion and control, like that of the settlor of the five trusts in the Reinecke case, was not exclusive. Moreover, he had no exclusive power to control the disposition of the property after his death.

On page 19 of the Government's brief in the Tyler case, stress is laid on the fact that after the decedent tenant's death the survivor has a sole interest, sole power of management and the power of testamentary disposition. But these powers were not transferred by the decedent tenant at his death. He did not enjoy them himself. All these powers were vested irrevocably in the surviving tenant under the original grant. The fact that she did not enjoy them during the decedent's lifetime is immaterial. They were enjoyed and exercised by them as the unity holding the estate. Judge Woolley in his opinion has ably demonstrated the fallacy of the Government's circular argument in this respect. (See Record, pp. 15-16.)

It is urged that taxes are practical matters and that this Court should disregard the "legal fiction" that upon the death of one tenant by the entirety, the surviving tenant takes no new estate. Unquestionably, taxes are practical matters. But this Court cannot disregard the inherent nature and incidents of an estate by the entirety as it exists under the law of Pennsylvania. That upon the creation of an estate by the entirety each tenant becomes seized of the whole, with the immediate right of use and enjoyment thereof; that neither tenant can deprive the other of his interest; that the death of one tenant obliterates his interest; and that the estate, vested irrevocably in the surviving tenant at the inception of the tenancy, includes the right to use and enjoy the whole property both during the decedent tenant's lifetime and after his death, are all incontrovertible realities. To disregard any of them is to destroy the estate. Such realities cannot be fictions; they constitute rules of property, and as such confer substantial substantive rights.

Counsel for the Government virtually concede that there is no transfer of any interest or estate upon the death of a tenant by the entirety. It is argued, however, that the subject of the tax imposed by the Revenue Act of 1921 is the "transfer of use or economic benefit upon the death of a decedent". (Brief for United States in Tyler case, page 20.) This argument ignores the elemental principle that the subject of an estate tax can be only the transmission of property at death. A shifting of use and enjoyment may accompany a transfer of property; but it is not in itself tantamount to a transfer of property. This was pointed out by Judge Woolley in his opinion in the Provident Trust Company case, when he said (Record, p. 16):

> "A mere change of status, though accompanied by economic benefits, does not necessarily involve a transfer of an interest in property, even if the change be brought about by death. It can hardly be said that the change effected by death of the tenant of a particular estate involves a transfer of his estate to the remainderman when, in law, the two estates were created at the same time long before, the estate of the remainderman having vested at the time of its creation."

Furthermore, an estate tax cannot be imposed upon the mere shifting at death of the use or enjoyment of property "which originally belonged to decedent or was purchased solely with his money". (Brief for United States in Tyler case, page 20.) If, for example, a decedent purchased an annuity and died shortly thereafter, it could not reasonably be contended that the value of the annuity should be included in his gross estate for estate tax purposes.

Even if it were true that the subject of an estate tax can be the mere shifting of use and enjoyment at

death, nevertheless the imposition of a tax on a tenancy by the entirety would still be unjustifiable. For there is not even a shifting of use and enjoyment at the death of the decedent tenant. The decedent tenant's use and enjoyment, together with his whole interest in the property, is simply wiped out by his death. The surviving tenant, by virtue of rights vested in her by the creative instrument, had the use and enjoyment of the entire property before his death; after his death she has the same use and enjoyment, by virtue of the same rights. Furthermore, the surviving tenant enjoys no new rights which formerly belonged to or were enjoyed by the decedent tenant.

Upon the death of one tenant by the entirety there is neither transmission of title or interest in property nor shifting of use and enjoyment. There is only a cessation or obliteration of an interest. An estate tax, which is the only form of tax Section 401 of the Revenue Act of 1921 purports to impose, can be predicated only upon the exercise of the privilege of transmitting property at death. To establish the exercise of this privilege by a decedent in respect of property held by himself and his spouse as tenants by the entirety, it is not sufficient to show that the decedent's interest in such property has been obliterated by his death. It would not even be sufficient to show that there was a shifting of use and enjoyment of the property at his death. It would have to be shown that some interest of the decedent was, at his death, transferred by him to the surviving tenant, and that he could, up to the moment of his death, have prevented such transfer by the exercise or non-exercise of powers vested in himself alone.

At page 20 of the brief for the United States in the Tyler case it is said:

> "Thus the effect of the creation of the tenancy by the entirety is the initial step in the gift from the

owner to the spouse, which is completed by the donor's death, for, until death, it could not be ascertained whether the spouse could ever take the property."

It is immaterial that the surviving tenant's interest might possibly have been defeated by her death during the decedent's lifetime; for it was not within the power of the decedent to bring about the destruction of her interest in this way. The decedent was even more powerless than the settlor of the five trusts in the Reinecke case.

The whole argument of counsel for the United States would seem to be predicated upon the assumption that the Congress intended to impose the estate tax upon the original transfer by which the tenancy was created, on the theory that this transfer remained incomplete until death. For reasons already stated, this transfer was complete, as to the transferor, the moment the estate was created. In this respect it was the same as any other irrevocable gift inter vivos. The provisions of the Act, however, conclusively show that the Congress intended to impose the tax on an entirely different transfer, which it mistakenly believed to be both commenced and completed at death. Section 402 (d), after requiring the inclusion of the value of property held as tenants by the entirety in the gross estate, proceeds:

> "*Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, . . . then to the extent of one-half of the value thereof."

Where the original transfer to a decedent and his spouse as tenants by the entirety is by gift, bequest, devise or inheritance from some one else, the decedent cannot be said to be the original transferor. If the Congress intended to impose the tax on the transfer by which the

tenancy was created, then it has deliberately attempted, by the above-quoted provision of Section 402 (d), to tax the decedent's estate for transfers made by some one else. The only inference, therefore, which can reasonably be drawn from the above provision is that the Congress did not intend to tax the original transfer.

The foregoing provision of the Revenue Act of 1921 in respect of tenancies created by gift, bequest, devise or inheritance is for another reason irreconcilable with the construction which counsel for the United States would place upon the Act. At pages 19-20 of the brief for the United States in the Tyler case it is stated:

> "Analysis of the Estate Tax Act makes clear the intention of bringing within its scope all property as to which there is a transfer of use or economic benefit upon the death of a decedent. This inclusiveness is limited so as to apply only to that part of the property which originally belonged to decedent or was purchased solely with his money."

By requiring the inclusion in the gross estate of one-half the value of property acquired by gift, bequest, devise or inheritance, the Congress has required the inclusion of property which did not originally belong to decedent and which was not purchased solely with his money.

Such incongruities inevitably follow from any attempt to depart from the fundamental principle "that transmission by death . . . is alone the generating source from which the taxing power, here exercised, takes its being". (Opinion of Judge Woolley, Record p. 16.)

On page 21 of the brief for the United States in the Tyler case it is stated: "The Act must 'at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another'. Chase National Bank v. United States, supra, page 337". Separated from its con-

text, the language quoted from the Chase National Bank case tends to convey a meaning entirely different from that which was intended. Its true import is disclosed by quoting more fully from the opinion of Mr. Justice Stone, at page 337:

> "But the plaintiff says that the tax here must be deemed to be a tax on property because the beneficiaries' interests in the policies were not transferred to them from the decedent, but from the insurer, and hence there was nothing to which a transfer or privilege tax could apply. Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used": Mr. Chief Justice Marshall in COHENS v. VIRGINIA, 6 Wheat. 264, 399, 5 L. ed. 257.

It is not contended that property held by a husband and wife as tenants by the entirety is immune from taxation. Presumably, under the decision of this Court in BROMLEY v. McCAUGHN, 280 U. S. 124 (1929), the original transfer of the property by the decedent tenant to himself and spouse as tenants by the entirety could be subjected to a gift tax. But, as this Court has already said of the tax imposed by Section 401 of the Revenue Act of 1921, it "is not a gift tax and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126". Reinecke v. Northern Trust Co.,

supra, page 347. The only privilege upon the exercise of which Section 401 of the Act attempts to impose a tax is *the privilege of transmitting property at death*. If this privilege has not been exercised by the decedent in respect of property held as tenants by the entirety, the inclusion of the value of such property in the gross estate constitutes the imposition of a direct tax which, because it is unapportioned, is unconstitutional. It is not necessary to ascertain whether the decedent prior to death exercised any other privilege which might be made the subject of an excise tax. (See also Appeal of Root, 5 B. T. A. 696.)

The matters discussed in Part III of the petitioners' Argument have already been considered in this brief. (pages 36 to 38). It is submitted that the Congress cannot, by setting up an "artificial entity" (the value of the net estate), impose an estate tax upon property which could not otherwise be reached by such a tax. In Frick v. Pennsylvania, 268 U. S. 473 (1925), this Court, by Mr. Justice Van Devanter, pointed out that to permit a tax to be measured by a standard which takes no account of the distinction between what is taxable in itself and what is not taxable in itself "would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail". (p. 495.)

The measure of a tax imposed upon the exercise of a particular privilege must include only property in respect of which the privilege is exercised. See NICHOLS v. COOLIDGE, supra, FRICK v. PENNSYLVANIA, supra, FREW v. BOWERS, supra, FLINT v. STONE-TRACY CO., 220 U. S. 107 (1911), LEWELLYN v. FRICK, 268 U. S. 238 (1925).

In NICHOLS v. COOLIDGE, supra, this Court said (page 542): "Undoubtedly Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation.

This is necessary to prevent *evasion* and give practical effect to the exercise of admitted power, *but the right is limited by the necessity*". (Italics ours) The purpose of the Congress in requiring the inclusion in the gross estate of property held as tenants by the entirety was, obviously, not to prevent evasions. For it has required the inclusion of one-half the value of property acquired by way of "gift, bequest, devise or inheritance" by the decedent and spouse as tenants by the entirety, in respect of which there could not possibly be an intent to evade the tax. It is not contended that either of the tenancies by the entireties involved in the instant proceedings were created in contemplation of death.

It is said (page 25 of brief for United States in Tyler case) that married taxpayers in States where tenancy by the entirety exists can escape taxation if the provisions of Section 402 (d) of the Act are held unconstitutional. But as Mr. Justice McReynolds said in Nichols v. Coolidge, supra, (page 540), the "mere desire to equalize taxation cannot justify a burden on something not within congressional power". It is not claimed that estates by the entirety are immune from every form of taxation.

The power to require the inclusion in the gross estate of the value of property held by a decedent and spouse as tenants by the entirety is not a "necessary adjunct" to the power to levy estate taxes. The object sought to be reached by an estate tax is property transmitted at death. But since property held by a decedent and spouse as tenants by the entirety is never transmitted by the decedent tenant at his death, the inclusion of such property in the value of his gross estate will not in the least facilitate the collection of an estate tax. Furthermore, the imposition of an unapportioned direct tax is expressly forbidden by the Constitution. In SCHLESINGER v. WISCONSIN, 270 U. S. 230, 240 (1926), this Court held that a

"forbidden tax cannot be enforced in order to facilitate the collection of one properly laid".

It is immaterial that in each of the instant cases the property held by the decedent and spouse as tenants by the entirety originally belonged to the decedent. The decedent did not, in respect of such property, exercise the particular privilege upon which alone an estate tax can be predicated; his estate or the property of another should not be taxed for a privilege not exercised by him.

The decisions of the Circuit Court of Appeals for the Third Circuit in the Provident and Girard cases are consonant with the general consensus of opinion on this question. See Dime Trust and Safe Deposit Co. v. Phillips, 30 Fed. (2d) 395, Blount v. United States, 59 Court of Claims 328, Appeal of Root, 5 B. T. A. 696, Appeal of Dyer, 5 B. T. A. 711, Appeal of Murphy, 5 B. T. A. 952. See also Handy on Inheritance and Other Like Taxes, 1929 ed., Chapter XI, pp. 127-135.

CONCLUSION.

It is respectfully submitted that the judgments of the Circuit Court of Appeals for the Third Circuit in both cases herein should be affirmed.

Respectfully submitted,

CUTHBERT H. LATTA, JR.,
JOHN S. SINCLAIR,
J. SNOWDON RHOADS,
CHARLES SINKLER,
Counsel for Respondents.

JOHN R. YATES,
PAUL F. MYERS,
of WILLIAMS, MYERS AND QUIGGLE,
Of Counsel.

APPENDIX A.

In BRUSHABER v. UNION PACIFIC RAILROAD, 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. Rep. 236, Mr. Chief Justice White said (pages 12-14):

"That the authority conferred upon Congress by sec. 8 of article 1 'to lay and collect taxes, duties, imposts and excises' is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that there was authority given, as the part was included in the whole, to lay and collect income taxes. Again, it has never moreover been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of art. 1, sec. 8, cl. 1, that 'all duties, imposts and excises shall be uniform throughout the United States', and to the limitations of art. I., sec. 2, cl. 3, that 'direct taxes shall be apportioned among the several states', and of art. 1, sec. 9, cl. 4, that 'no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken'. In fact, the two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in Pollock v. Farmers' Loan & T. Co. 157 U. S. supra, at page 557: 'In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must

be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises'. It is to be observed, however, as long ago pointed out in Veazie Bank v. Fenno, 8 Wall. 533, 541, 19 L. ed. 482, 485, that the requirements of apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all-embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted. In the whole history of the government down to the time of the adoption of the 16th Amendment, leaving aside some conjectures expressed of the possibility of a tax lying intermediate between the two great classes and embraced by neither, no question has been anywhere made as to the correctness of these propositions."

APPENDIX B.

Tenancy by the entirety is recognized in the following States:

Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey (as to real property only), New York, North Carolina, Oregon (as to real property only), Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wyoming.

In the following States, property held as tenants by the entirety is not subject to any form of State inheritance tax:

Arkansas, Delaware, Florida (no inheritance tax law), Indiana, Maryland, Massachusetts (real property not

taxed; personal property doubtful), Michigan, Missouri, New Jersey, Oregon, Pennsylvania, South Carolina, Vermont, Virginia.

In West Virginia property held as tenants by the entirety is, by express statutory provision, not subject to State inheritance tax unless the entire property originally belonged to decedent.

In the following States property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of one-half its value:

Colorado, Kentucky, Montana, New York, Wyoming.

In North Carolina property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of one-half its value unless the decedent furnished the entire purchase price, in which case it is taxable at its full value.

In Tennessee property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of one-half its value or the value of such other part as can be shown to have originally belonged to the decedent.

In Iowa, Mississippi, Rhode Island and Utah property held as tenants by the entirety is, by express statutory provision, subject to State inheritance tax to the extent of its full value less the value of such part as originally belonged to or was purchased by the surviving tenant.